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VIA E-MAIL

City of Cincinnati Zoning Board of Appeals
c/o Kevin Tidd, Secretary
c/o Marion Haynes, Attorney
805 Central Avenue, Suite 500
Cincinnati, OH 45202

RE: Brief of Cincinnati Preservation Association and Cincinnati Preservation Collective in re: Appeal of Columbia REI, LLC (“Columbia”) from Denial of Certificate of Appropriateness for Demolition of 716-718 Main Street (“Appeal”), Dennison Hotel Building (“Property”) in the Main Street Historic District

Hon. Members of the Zoning Board of Appeals:

I am writing on behalf of the Cincinnati Preservation Association and Cincinnati Preservation Collective (together, the “Preservation Organizations”) in connection with the above referenced Appeal. Columbia is appealing the Historic Conservation Board’s (“HCB”) denial of a certificate of appropriateness for the demolition of the historic Dennison Hotel building.

Columbia’s 21-page brief is nothing more than an attempt to distract this Board from the fact that **Columbia recently purchased the Dennison knowing full well that it is located in a historic district with the intent to demolish it so that it can assemble property for a theoretical development.** In light of these facts, Columbia has not and cannot prove that demolition is the only option for the Dennison. To seek a demolition permit on these facts is not only a complete affront to Cincinnati’s historic preservation laws – *it shocks the conscious*.

Whatever allegations of economic hardship Columbia has concocted to support its intentions to raze the Dennison are completely incredible in the face of these disqualifying facts. Under the standards for reviewing a certificate of appropriateness for a demolition in the Cincinnati Zoning Code, the HCB was right not to allow someone to purchase a known historic building in a known historic district with the intention of tearing it down. To do so would be entirely antithetical to the Cincinnati Historic Preservation Ordinance, which was just overhauled by the people of Cincinnati in 2012. To find that the HCB acted unreasonably, arbitrarily and capriciously in denying Columbia’s application for demolition under these disqualifying facts would itself be unreasonable, arbitrary, capricious, and contrary to law.

Cincinnati law does not permit the demolition of a building located in a historic district unless the property owner can prove economic hardship. There are a number of factors in

Zoning Code Section 1435-09-2 that one must prove with credible evidence in order to be eligible to receive a certificate of appropriateness for demolition. Columbia has attempted to avail itself of the economic hardship exception; however, as the HCB correctly identified, Columbia's evidence of economic hardship is not credible, and, as such, Columbia is not entitled to use this exception.

Columbia presented testimony from seven witnesses to the HCB. Their brief paints an incomplete picture of their testimony before the HCB. The transcript of their testimony shows that the credibility of each and every witness was successfully challenged by the Preservation Organizations on cross-examination. In fact, all of Columbia's witnesses provided testimony that is harmful, if not fatal, to Columbia's case and militates in favor of the HCB's decision.

For the reasons more fully stated herein, the HCB's decision is a proper exercise of its discretion and must be upheld.

I. WHAT COLUMBIA NEEDED TO PROVE BEFORE THE HCB

In order to be entitled to a certificate of appropriateness to demolish the Dennison, Columbia was required to present credible evidence to demonstrate an economic hardship under the factors and tests set forth in Cincinnati Zoning Code Section 1435-09-2, as follows:

§ 1435-09-2. - Certificates of Appropriateness; Standards for Review.

[T]he Historic Conservation Board has the duty to review and make a determination on all Certificates of Appropriateness in the manner prescribed herein for the purpose of furthering the conservation and integrity of the Historic Asset or Historic District affected. The Board may approve or approve with conditions an application for a Certificate of Appropriateness when it finds either:

- (a) That the property owner has demonstrated by credible evidence that the proposal substantially conforms to the applicable conservation guidelines; or
- (b) That the property owner has demonstrated by credible evidence that the property owner will suffer economic hardship if the certificate of appropriateness is not approved.

In determining whether the property owner has demonstrated an economic hardship for purposes of (b) above, the Historic Conservation Board shall consider **all** of the following factors:

- (i) Will **all** economically viable use of the property be deprived without approval of a Certificate of Appropriateness;
- (ii) Will the **reasonable** investment-backed expectations of the property owner be maintained without approval of a Certificate of Appropriateness; **and**
- (iii) Whether the economic hardship was **created or exacerbated** by the property owner.

In evaluating the above factors for economic hardship, the Historic Conservation Board may consider any or all of the following:

- (aa) A property's current level of economic return;
- (bb) Any listing of property for sale or rent, price asked, and offers received, if any, within the previous two years, including testimony and relevant documents;
- (cc) The feasibility of alternative uses for the property that could earn a reasonable economic return;
- (dd) Any evidence of self-created hardship through deliberate neglect or inadequate maintenance of the property;
- (ee) Knowledge of landmark designation or potential designation at time of acquisition; and/or
- (ff) Economic incentives and/or funding available to the applicant through federal, state, city, or private programs.

(Emphasis added).

To prove economic hardship to justify demolition, an applicant must prove **all three economic hardship factors** in Section 1435-09-2(b)(i-iii) above. In evaluating whether an applicant has satisfied **all three factors**, the HCB may apply any or all of the tests in Section 1435-09-02(b)(aa-ff) above. If the applicant cannot satisfy **all three factors** for economic

hardship by credible evidence, then the applicant is not entitled to a certificate of appropriateness on the basis of economic hardship.

The evidence in the record shows that Columbia has not and cannot satisfy **all three** of the economic hardship factors. Therefore, while Columbia has taken on the ownership of a building that may require additional expenses because of its age and condition, it has not demonstrated by credible evidence that it has suffered or will suffer economic hardship under the factors and tests set forth by the people of Cincinnati in Zoning Code Section 1435-09-2.

II. WHAT COLUMBIA MUST PROVE ON APPEAL

The standard of review for this Board is not whether the Board believes that the HCB's decision was right or whether it agrees with the outcome. *See Dudokovich v. Lorain Metropolitan Housing Authority*, 58 Ohio St. 2d 202 (1979). "[T]he Zoning Board of Appeals may find that the order, adjudication, or decision is illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." (See Zoning Code Section 1449-17). The HCB's decision is assumed to be a proper exercise of its discretion, and the burden of proof is on the applicant to prove that the HCB abused its discretion. *C. Miller Chevrolet, Inc. v. City of Willoughby Hills*, 38 Ohio St. 2d 298 (1974); *BP Oil Co. v. Dayton Bd. of Zoning Appeals*, 109 Ohio App. 3d 423 (Ohio App. Ct. Dist. 2, 1996).

Therefore, this Board must pay deference to the HCB's decision and may only reverse it if Columbia overcomes this presumption by proving with credible evidence that the HCB acted illegally, arbitrarily, capriciously, unreasonably or contrary to the preponderance of the evidence in the record before it. A review of the evidence in the administrative record unequivocally shows that Columbia has not satisfied, and cannot satisfy, its burden of proof.

III. COLUMBIA'S WITNESSES

At the May 26, 2016, hearing before the HCB (hereinafter cited as "May Tr. at ____"), Columbia presented seven witnesses in support of its application. In its brief, Columbia cherry-picked testimony from each of the witnesses that it argues demonstrates that the HCB abused its discretion. Yet, they have conveniently omitted the testimony of each of their witnesses that defeats their application and justifies the HCB's decision.

The following cites to the testimony of Columbia's witnesses in the record that fills in the blanks left by Columbia in its brief. This evidence overwhelmingly supports the HCB's finding that Columbia has not satisfied the factors for economic hardship set forth in Section 1435-09-2.

A. ED VANEMON – COLUMBIA'S CHIEF FINANCIAL OFFICER

As the first witness to testify at the HCB hearing, Columbia's Chief Financial Officer, Ned VanEmon, defeated Columbia's case from the very outset. Mr. VanEmon testified that:

- Columbia purchased the Dennison in 2013, "just to protect its investment" in its surrounding surface parking lots. (May Tr. at 38-40, 44-45; 60).
- Columbia has not listed the Property for sale. (May Tr. at 45).
- Columbia has kept the Dennison vacant since its purchase and has not attempted to rent it. (May Tr. at 48).
- Mr. VanEmon has no experience redeveloping a building like the Dennison. (May Tr. at 74).
- Columbia purchased the Dennison with the intent to assemble property for a "shovel-ready" site for a completely speculative new development. (May Tr. at 60-63).
- Columbia does not need the Property for its speculative office development, yet Columbia is seeking to demolish the Dennison anyway. (May Tr. at 63-64).
- **Columbia purchased the building with the intent to demolish it.** (May Tr. at 65).

Additionally, during Mr. VanEmon's testimony, Mr. Barrett, counsel for Columbia, testified that his client knew when it purchased the Dennison that it is a contributing building in a historic district. (May Tr. at 54). Mr. VanEmon corroborated Mr. Barrett's testimony on cross-examination. (May Tr. at 65).

Mr. VanEmon's testimony, as well as the testimony of Columbia's counsel Fran Barrett, disqualifies Columbia from meeting the standards for economic hardship. **Because Columbia purchased the Dennison with knowledge of its location in the Main Street Historic District and with the intent to demolish it, Columbia cannot satisfy the third test for demonstrating economic hardship: whether the economic hardship was created or exacerbated by the property owner.** (See Zoning Code Section 1435-09-2(b)(ii)).

If Columbia did not wish to accept the incidents and responsibilities of owning a 124 year-old, eight-story building located in an historic district in Cincinnati, Ohio, then it should not have purchased the Dennison in the first place. The law does not allow Columbia to avail itself of the economic hardship exception where it purchased an historic property with full knowledge of the alleged economic hardship. The law does not allow a property owner to tear down a building in a historic district simply because it is costing the property owner money to maintain.

The HCB cannot be said to have abused its discretion where the applicant admitted under oath that it cannot satisfy one of the three standards for economic hardship. For the HCB to have done so would have been contrary to law. Therefore, on Mr. VanEmon's testimony alone, the HCB was justified in its decision to deny demolition.

B. CRAIG PETERSON - HGC CONSTRUCTION

Craig Peterson of HGC Construction testified on Columbia's behalf that:

- HGC prepared estimates for the renovation of the Dennison for a boutique hotel in 2005 and 2009, and for apartments in 2009. (May Tr. at 80).
- HGC updated those estimates using construction cost estimates from 2015, and 2016. (May Tr. at 79, 81).
- HGC provided construction cost estimates for converting the Dennison to a condominium using conceptual plans from 2009 and construction cost estimates from 2016. (May Tr. at 81-83).
- HGC estimated converting the first floor of the Dennison to retail and restaurant uses without any plans or specifications using construction cost estimates from 2016. (May Tr. at 84-87).
- In making their estimates, HGC only worked from sketches and did not take into account any specific finish levels. (May Tr. at 80).
- HGC only provided estimates for three of the 22 permitted uses in the applicable "DD" Downtown Development zoning district. (May Tr. at 96).
- HGC cannot be sure of the actual costs of renovations because their estimates are not based on any concrete information. (May Tr. at 92).

Columbia had intended for Mr. Peterson's testimony to prove that denying demolition would deprive Columbia of all economically viable use of the Property. However, Mr. Peterson admitted on cross-examination that HGC's cost estimates are not based on credible information. Therefore, by his own admission, this evidence is not credible and cannot be relied upon to prove economic hardship. This testimony only serves to highlight one of the primary weaknesses of Columbia's case; it simply is not credible to assert that demolition is the only option for the Dennison.

C. LANCE BROWN – BECK CONSULTING

Lance Brown of Beck Consulting testified on Columbia's behalf that:

- He did not take into account any governmental financial incentives when determining economic feasibility. (May Tr. at 118-129).
- He admitted that the most economically infeasible project can become feasible with enough government money added into the analysis, yet he refused to consider any public incentives. (May Tr. at 119-120).
- He is not familiar with new market tax credits. (May Tr. at 125).
- He is not familiar with the City's LEED tax abatement program. (May Tr. at 125).
- He is not familiar with EB-5 financing. (May Tr. at 125).
- He has never appraised, nor is aware of any property in downtown Cincinnati, that has been developed or redeveloped with 100% private investment. (May Tr. at 128).
- He has never appraised or evaluated a property on a streetcar line. (May Tr. at 134).

Despite Mr. Brown's incomplete and glaringly deficient analysis, he incredibly concluded that the Dennison has no economically viable use. Columbia had intended for Mr. Brown to provide credible evidence that no private party would ever invest in renovating the Dennison. Yet, Mr. Brown's conclusions are completely without credibility because they intentionally fail to account for the reality that financing historic renovations almost always involves public and private investment. For those familiar with historic rehabilitations, Mr. Brown's testimony is completely unbelievable, and the HCB was right to find that this is not credible evidence to support demolishing the Dennison.

D. STEVEN HARM – ADVANTAGE GROUP ENGINEERS

Steven Harm of Advantage Group Engineers testified on behalf of Columbia that:

- He has no experience with an eight-story, nineteenth-century, high-rise building. (May Tr. at 168).
- The Dennison is generally structurally stable. (May Tr. at 168).
- The Dennison's condition is on par with other comparable buildings of comparable age. (May Tr. at 168).
- He does not know for sure whether the Dennison is constructed of posts and beams made out of steel and cast iron rather than wood. (May Tr. at 169).
- The Dennison could be used for a residential use without having to retrofit the lateral and gravity structural systems. (May Tr. at 172).
- Demolition is not the only option for the Dennison. (May Tr. at 172).

In his testimony, Mr. Harm admitted that the Dennison could be viable for a multi-family residential use. Therefore, Mr. Harm admits that Columbia cannot satisfy all of the factors for economic hardship in Section 1435-09-2, and his testimony supports the HCB's decision to deny demolition.

E. BRAD ROGERS – SSRG

Brad Rogers of SSRG testified on behalf of Columbia that:

- His report regarding the cost of structural upgrades to the Dennison is not complete or conclusive. (May Tr. at 176).

Considering his testimony, the evidence presented by Columbia's structural engineer could not possibly be considered credible to support demolition of the Dennison.

F. MARK BROWNING – PDT ARCHITECTS

Mark Browning of PDT Architects testified on behalf of Columbia that:

- The fundamental economic factors for housing in downtown Cincinnati are the same in 2016 as they were in 2009 or 2012. (May Tr. at 198).

Mr. Browning is an architect and not an expert or authority on the downtown housing market. His lay testimony regarding the current economic conditions in downtown Cincinnati relative to those in the past are completely incredible at best.

G. SEAN DONOVAN – COMEY & SHEPHERD

Sean Donovan of Comey & Shepherd Realtors testified that:

- The Dennison is not and never was for sale. (May Tr. at 212).

Mr. Donovan's testimony is relevant to the test of whether "any listing of property for sale or rent, price asked, and offers received, if any, within the previous two years, including testimony and relevant documents." (See Zoning Code Section 1435-09-02(b)(bb)). Mr. Donovan's testimony cannot possibly support a finding of economic hardship where Columbia failed to even test the market for the property by listing it for sale. As such, Mr. Donovan's testimony actually supports the HCB's decision.

H. KATHY RYAN – MANLEY BURKE

Finally, Columbia asked attorney Kathy Ryan to confirm her research that concludes that the Dennison was designed by Samuel Hannaford & Sons architects. (May Tr. at 213). Because there is no requirement that the Dennison be designed by Samuel Hannaford & Sons, or for any other famous architect for that matter, in order for it to be considered historically significant, Ms. Ryan's statements do not have any bearing on the factors or tests for economic hardship.

None of Columbia's seven witnesses introduced any credible evidence that Columbia would suffer economic hardship if it cannot demolish the Dennison. Instead, their testimony proved that Columbia has never seriously considered rehabilitating the Dennison, but rather purchased it with the intention of razing it as it has done on numerous properties surrounding the Property. This can never be a case for demolishing a building in an historic district.

IV. THE PRESERVATION WITNESSES

At the June 16, 2016, HCB hearing (cited herein as "June Tr. at ____"), the Preservation Organizations presented four witnesses to rebut Columbia's evidence. Columbia was provided an opportunity to cross-examine each of these witnesses at this hearing. Upon cross-examination, the only testimony elicited by Columbia and cited by it in its brief in support of its appeal is as follows:

- Ms. Margo Warminski of the Cincinnati Preservation Association is not aware of any historical persons of note or events that took place in the building. (June Tr. at 24).
- Paul Mueller of the Cincinnati Preservation Association believes that not every project with historic tax credits will be economically feasible. (June Tr. at 44).

- That there is no guarantee of an award of state historic tax credits and that without a tax credit award a project may not be feasible. (June Tr. at 64).
- Downtown real estate broker Kathleen Norris believes that the Dennison can achieve a necessary level of income to justify to support apartments on the property. (June Tr. at 88).
- Kathleen Norris believes that apartments are feasible, but that a boutique hotel, offices, and a partial use of the Dennison would not be feasible. (June Tr. at 94-95).
- Construction company owner Jason Snyder has not been in the Dennison, did not account for asbestos removal in his report, and does not believe that his estimates are superior to HGC's estimates. (June Tr. at 110).

None of this testimony can possibly overcome the significant disqualifying deficiencies of Columbia's implausible evidence.

V. COLUMBIA'S LEGAL ARGUMENTS

In its brief, Columbia presents two primary legal arguments: (i) that Columbia complied with the standards for demolishing non-contributing buildings in historic districts; and (ii) that the HCB improperly relied on unsworn statements of the Urban Conservator, improperly relied on evidence of speculative tax credit availability, and improperly relied on evidence that Columbia did not offer the property for sale. None of these legal arguments have any merit or credibility.

First, upon Columbia's motion, this Board has granted Columbia the right to cross-examine Urban Conservator Beth Johnson at the upcoming hearing before the Board. While this argument lacks any merit, allowing Columbia to cure this alleged defect renders Columbia's arguments in this regard moot. Therefore, these arguments should be disregarded and stricken from the record.

Columbia's argument that it has complied with the standards for demolishing non-contributing buildings in historic districts also lacks any merit. In making this assertion, Columbia fails to cite to the actual language of the Main Street Historic District Guidelines. With respect to demolition in the historic district, the Guidelines expressly provide as follows:

Demolition of existing buildings shall be permitted if one of the following conditions exist:

- a. Demolition has been ordered by the Director of Buildings & Inspections for the public safety because of an unsafe or dangerous condition which constitutes an emergency.
- b. The owner can demonstrate to the satisfaction of the Historic Conservation Board that the structure cannot be reused nor can a reasonable economic return be gained from the use of all or part of the building proposed for demolition.
- c. The demolition request is for an inappropriate addition, or an incompatible building, and the demolition of said structure will not adversely affect the streetscape as determined by the Historic Conservation Board.
- d. The demolition request is for a non-significant portion of a building and the demolition will not adversely affect those parts of the building, which are significant as determined by the HCB.

There is no evidence, nor has there been any assertion of any evidence, to support the existence of condition (a).

Condition (b) requires a demonstration and a finding of economic hardship, which requires credible proof under Section 1435-09-2. As is set forth more fully herein above, Columbia has not and cannot provide such credible proof.

Condition (c) does not apply because the request is not related to an “incompatible building.” Columbia admitted that the Dennison is “a contributing building in an historic district.” (May Tr. at 54; 65). Whether it is “a contributing building” as Columbia stated on the record before the HCB, or a “compatible building” as they claim in their brief (p. 12), there is no dispute that the Dennison is located within the Main Street Historic District and that any proposed demolition therein is subject to the Guidelines. As such, the only way that the Dennison can be demolished is if it satisfies one of the conditions of the four conditions for demolition in the Guidelines, or if they prove by credible evidence that they will suffer economic hardship under the factors in Section 1435-09-2. Columbia has not and cannot prove either.

Condition (d) does not apply because Columbia is proposing to demolish the entire building, not just a non-significant portion thereof.

Upon a review of the demolition guidelines for the Main Street Historic District, Columbia’s assertion that the Guidelines support the demolition of the Dennison is completely without merit. Further, as set forth herein above, the testimony of Columbia’s witnesses evidence that it cannot satisfy the factors for determining economic hardship in Section 1435-09-

2. Therefore, Columbia cannot prove any of the standards to justify the issuance of a certificate of appropriateness for demolition.

A review of Zoning Code Section 1435-09-2 evidences that Columbia's arguments that the HCB erred by considering evidence related to the availability of tax credits and by considering that Columbia did not offer the property for sale in making its decision are complete and utter nonsense. Section 1435-09-2 expressly grants the HCB the right to consider both of these matters in determining economic hardship.

In evaluating the above factors for economic hardship, the Historic Conservation Board may consider any or all of the following:

(bb) Any listing of property for sale or rent, price asked, and offers received, if any, within the previous two years, including testimony and relevant documents;

(ff) Economic incentives and/or funding available to the applicant through federal, state, city, or private programs.

(Emphasis added).

The Cincinnati Zoning Code specifically allows, if not encourages, the HCB to consider whether the applicant tested the economic viability of the building by listing it for sale and by considering public and private incentives. (See Section 1439-09-2(bb)(ff)). The Zoning Code does not require the HCB to consider these tests or for them to be controlling. However, contrary to Columbia's argument, there is also nothing in the Zoning Code that provides that the HCB cannot consider these tests or find them to be determinative in making its decision.

Columbia is asking this Board to reverse the HCB's decision because it considered factors that are expressly permitted to be considered in the Zoning Code. Making such an argument is nonsensical and demonstrates the overall weakness of their appeal.

VI. CONCLUSION

The evidence that Columbia provided to the HCB is not credible to demonstrate economic hardship to support a finding that demolition is the only option for the Dennison. Upon a review of the administrative record, the evidence supports the HCB's decision to deny the certificate of appropriateness. Columbia cannot meet **any** of the standards for granting a

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certificate of appropriateness in Section 1435-09-2, and it must meet all of them to be entitled to a certificate of appropriateness.

Therefore, whether this Board agrees with the decision or the outcome, there is no lawful basis to reverse the HCB's decision. The HCB's decision, like the Dennison, must stand.

Respectfully Submitted,

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